

*United States Bankruptcy Court
District of Massachusetts*

In re:)	
)	
MAURICE F. CUNNINGHAM,)	Chapter 7
DEBTOR.)	Case No. 03-41039-JBR
_____)	

ORDER ON MOTION BY DEBTOR FOR AN ORDER CONFIRMING SALE
PROCEEDS OF 95 JOHNSON STREET, N. ANDOVER, MA AS EXEMPT PURSUANT
TO 11 U.S.C. § 522(c)

This matter came before the Court for hearing on the Motion by Debtor for an Order Confirming Sale Proceeds of 95 Johnson Street, N. Andover, MA as Exempt Pursuant to 11 U.S.C. § 522(c) (the "Motion") and the Objection of William Pasquina, P.C. (the "Creditor"). The salient facts are not in dispute. The Creditor holds a debt which this Court previously ruled is nondischargeable. The Court denied the Creditor's untimely objection to the Debtor's homestead exemption in the property located at 95 Johnson Street, North Andover, MA (the "Property") which he and his wife owned as tenants by the entirety when the Debtor filed his bankruptcy. Pursuant to 11 U.S.C. § 522(f), the Court avoided the prepetition judgment lien which the Creditor had obtained against the Property. The Trustee has abandoned the estate's interest in the Property which now has been sold and, after payment of liens and costs of sale has netted approximately \$151,000 (the "Homestead Proceeds") currently held in escrow.

The parties have taken their dispute to state court where the Creditor has sued the Debtor and the non-debtor spouse. Among other things the Creditor sought to reach the Homestead Proceeds. On September 14, 2005 the state court issued its Memorandum of Order on Plaintiff's Motion for Equitable Relief in which it ordered, among other things, "that any funds due to the defendant/wife, after encumbrances **and**

homestead exemption [which the court noted in a footnote was \$300,000], from the sale of the [Property] are to be held in constructive trust for the benefit of the plaintiff.” (Emphasis added). Approximately one month later the Creditor filed a supplemental brief arguing that the proceeds of the sale of the Property are not exempt and essentially seeking reconsideration of the state court’s order. That precipitated the filing of the Debtor’s Motion with this Court.

The Debtor seeks a judgment that he is entitled to the Homestead Proceeds on the grounds that they are covered by his state homestead exemption.¹ The Creditor objects to the requested relief on two grounds: first, that the Debtor’s homestead exemption does not attach to the proceeds of the sale of the exempted property because the Massachusetts homestead statute does not expressly provide that the exemption continues in the proceeds upon sale of the property and second, that the non-Debtor spouse is entitled to at least one half of the exempt proceeds and her share is not protected.²

At the outset, the Court wishes to be clear: its order is **only** with respect to the issue of whether the **Debtor’s exemption** in the Homestead Proceeds continues after sale of the Property. This Court is **not** ordering that the Homestead Proceeds are to be

¹It is well settled that, with limited exceptions not relevant here, section 522(c) of the Bankruptcy Code renders the Massachusetts homestead exemption applicable to debts incurred after the filing of the homestead but prior to the filing of the bankruptcy petition. *Patriot Portfolio v. Weinstein (In re Weinstein)*, 164 F.3d 677, 683 (1st Cir. 1999),

²The Creditor did not oppose the Motion on procedural grounds even though it clearly asks for declaratory judgment and thus falls within the scope of Fed .R. Bank. P. 7001. This Court will do as Judge Feeney recently did in *In re Hyde*, 2005 WL 3274993 (Bankr. D. Mass. Sept. 26, 2005) and address the merits of the motion despite the procedural defect.

apportioned between the Debtor and his wife or how they are to be apportioned upon sale. Moreover it is **not** addressing the question of whether any portion of the Homestead Proceeds that the state court might order belong to the wife can be reached by the Creditor. These issues are left to the state court which has already begun its consideration of these issues.

The Creditor's first argument that the Debtor lost the homestead protection when the Property was sold is incorrect. The Court adopts the reasoning and holding of *Lowe v. Yochem (In re Reed)*, 184 B.R. 733,737-38 (Bankr. W. D. Tex. 1995), that the sale of the exempt property does not make the sale proceeds property of the estate. As the *Reed* court noted "The majority of courts, however, hold that a postpetition change in the character of property properly claimed as exempt will *not* change the status of that property, relying on the principle that once property is exempt, it is exempt forever and nothing occurring postpetition can change that fact." *Id.* (emphasis in the original; citations omitted).³ Therefore with respect to the Debtor, whatever share of the Homestead Proceeds belong to him under state law are exempt from the claims of his prepetition creditors, including the Creditor. See *Patriot Portfolio v. Weinstein (In re Weinstein)*, 164 F.3d 677, 683 (1st Cir. 1999), quoting *In re Whalen-Griffin*, 206 B.R. 277, 290 (Bankr. D. Mass. 1997) ("Because the exceptions to the Massachusetts homestead have the same effect on the homestead as the exceptions set forth in § 522(c), ... the Massachusetts homestead statute is preempted to the extent that it

³ Judge Feeney did not need to decide the issue of whether the sale proceeds are also exempt where the debtor voluntarily conveyed of his homestead property thus terminating the homestead. In *dicta* she did state, however, that she accepted the reasoning of *Reed*. *Hyde*, 2005 WL 3274993, *4.

permits exempt property to be liable for debts other than those expressly enumerated in § 522(c)(1)- (3), particularly because the language employed by Congress in § 522(c) is devoid of ambiguity.”).

The Creditor’s second argument, namely that upon the sale of the Property the Debtor and his spouse each were entitled to one-half of the proceeds presents two hurdles. First the Creditor is asking to adjudicate the non-debtor spouse’s rights in the Homestead Proceeds but in the current procedural context, the Court has no jurisdiction over the wife. Moreover even if it did, it would not exercise jurisdiction as that issue of appears to have been the subject of the state court’s September 14, 2005 Memorandum of Order when the court decided that the funds to be impressed with a constructive trust did **not** include the \$300,000 homestead exemption. It clearly is the subject of the Creditor’s supplemental brief currently pending before the state court.

Therefore, upon consideration of the foregoing, the Motion is ALLOWED only to the extent that the Homestead Proceeds are distributed to the Debtor or the state court confirms what this Court understands to be its ruling, namely that the Debtor’s exemption applies to the entire amount of the homestead exemption without any apportionment. The Court makes no ruling as to how the Homestead Proceeds are to be divided between the Debtor and non-debtor spouse and no ruling as to whether, if the state court ultimately determines that the wife is entitled to a share of the Homestead Proceeds, her share of the Homestead Proceeds should be exempt.

Dated: December 7, 2005


Joel B. Rosenthal
United States Bankruptcy Judge